

**LFC Requester:**

Lance Chilton

**AGENCY BILL ANALYSIS  
2016 REGULAR SESSION****WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:****LFC@NMLEGIS.GOV***and***DFA@STATE.NM.US***{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}***SECTION I: GENERAL INFORMATION***{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}**Check all that apply:*Original ☒ Amendment ☐  
Correction ☐ Substitute ☐**Date** February 2, 2016**Bill No:** SB 242**Sponsor:** Senator William Sharer**Agency Code:** 305**Short****Person Writing** Jennifer Salazar, AAG**Title:** Late-Term Abortion Ban**Phone:** 827-6990 **Email** jsalazar@nmag.gov**SECTION II: FISCAL IMPACT****APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Relates to SB 243  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

**Synopsis:**

Section 1 of Senate Bill 242 amends the title of Chapter 30, Article 5A from the "Partial-Birth Abortion Ban Act" to the "Late-Term and Partial-Birth Abortion Ban Act" (hereinafter "Act").

Section 2 defines "viability" as the "state of fetal development when, in reasonable medical judgment, there is a likelihood that the life of the fetus can be sustained outside the woman's uterus with or without artificial support." The term "reasonable medical judgment" is defined as "a medical judgment that would be made by a reasonably prudent physician knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."

Section 3 and 4 make minor stylistic changes.

Section 5 creates a new section of the Act to prohibit late-term abortions. Section 5(A) defines "late-term abortion" as "knowingly and willfully administering to any pregnant woman any medicine, drug, or other substance, or using any method or mean whereby an ultimate termination of her pregnancy is produced, or attempted to be produced, with the intent to destroy a viable fetus of twenty or more weeks gestational age." Under Section 5(B), a physician may only perform a late-term abortion under the following circumstances: (1) when it is necessary to preserve the life of a pregnant woman, provided that the physician take all reasonable steps to preserve the life and health of the fetus; or (2) when the pregnant woman asserts that the pregnancy resulted from sexual abuse, rape, or incest. Under Section 5(C), a physician must exercise the "degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar condition" when determining whether or not a fetus is viable. In addition, a physician must include findings of viability in the pregnant woman's medical record.

Section 6 imposes civil penalties for a physician who performs a late-term abortion. Specifically, a physician who performs a late-term abortion in violation of the Act is subject to a civil penalty

of not less than \$5,000. In addition, the physician's license "shall be" revoked or suspended for no less than one year. The NM Medical Board and NM Osteopathic Board are mandated to enforce the provisions regarding discipline of the physician's license.

Section 7 amends NMSA 1978, Section 30-5-1 of the Criminal Code to add the terms "abortion" and "physician." The term "abortion" is defined as "the intentional termination of the pregnancy of a female by a person who knows the female is pregnant" and "physician" is defined as "a person licensed to practice in the state of New Mexico as a physician pursuant to the Medical Practice Act or an osteopathic physician[.]" Section 7 deletes the following terms: accredited hospital, justified medical termination, and special hospital board.

Section 8 amends NMSA 1978, Section 30-5-2 to state that a hospital or medical facility shall not be required to admit any patient for the purposes of performing an abortion. Similarly, a person employed by a hospital or medical facility who has moral or religious objections to abortion, shall not be required to participate in medical procedures that will result in the termination of the pregnancy.

Section 9 repeals NMSA 1978, Section 30-5-3.

Section 10 is a severability provision that upholds the Act in the event any other provision of the Act is held invalid.

Section 11 requires Senate Bill 242 to take effect immediately.

## **FISCAL IMPLICATIONS**

N/A

## **SIGNIFICANT ISSUES**

This legislation raises constitutional concerns. In Planned Parenthood of Se. Pennsylvania v. Casey, the United States Supreme Court stated a "woman's right to terminate her pregnancy **before** viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." 505 U.S. 833, 870-71, 112 S. Ct. 2791, 2816-17 (1992). A state "reach[es] into the heart of the liberty protected by the Due Process Clause" when legislation attempts to impose an "undue burden" on a woman's ability to terminate or continue her pregnancy before viability. Id.

The Supreme Court has repeatedly held that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." Isaacson v. Horne, 716 F.3d 1213, 1225 (9th Cir. 2013) (quoting *Colautti*, 439 U.S. at 396, 99 S.Ct. 675). "That is why a state may not fix viability at a specific point in pregnancy." Id.; see also Jane L. v. Bangerter, 102 F.3d 1112, 1116-17 (10th Cir. 1996) (striking down a Utah law that was intended to prevent nontherapeutic abortions of nonviable fetuses after 20 weeks and finding that the state "made a deliberate decision to disregard controlling Supreme Court precedent set out in *Roe*, *Danforth*, *Colautti*, and *Webster*, and to ignore the Supreme Court's repeated directive that viability is a matter for an attending physician to determine.").

Furthermore, the definition of "viable" as having a "likelihood" that the life of the fetus can be sustained outside the woman's uterus, is unconstitutionally vague and does not clearly define when this "likelihood" exists. Furthermore, the Supreme Court has defined viability as a "realistic probability" not a "likelihood" of surviving outside the womb. See Casey, 505 U.S. at

870, 112 S. Ct. at 2817 (explaining “that the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman”). A recent expert medical opinion indicates that a fetus is not viable at 20 and 21 weeks of gestation. See Raju TN, Mercer BM, Burchfield DJ, Joseph GF. Perivable birth: Executive Summary of a Joint Workshop by the Eunice Kennedy Shriver National Institute of Child Health and Human Development, Society for Maternal-Fetal Medicine, American Academy of Pediatrics, and American College of Obstetricians and Gynecologists. *J Perinatol.* 2014, 34(5):333–342.

#### **PERFORMANCE IMPLICATIONS**

N/A

#### **ADMINISTRATIVE IMPLICATIONS**

N/A

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to Senate Bill 243.

#### **TECHNICAL ISSUES**

The term “medical facility” used in Section 8 is not defined.

#### **OTHER SUBSTANTIVE ISSUES**

The provision under Section 6 that would subject a physician who “knowingly and willfully” violates the Act to a license suspension or revocation may also raise constitutional due process concerns. It is not clear if a physician in violation of this provision would be afforded pre-deprivation procedures before revocation/suspension of his/her license to practice medicine.

#### **ALTERNATIVES**

N/A

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

#### **AMENDMENTS**

N/A